IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1584 of 1984

Hon'ble MR.JUSTICE Y.B.BHATT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

MANILAL ABHAJI

Versus

SWAMI VAISHVACHARYA GURA

Appearance:

MR SURESH M SHAH for Petitioner

MR PV NANAVATI for Respondent No. 1, 2, 3

CORAM : MR.JUSTICE Y.B.BHATT

Date of decision: 18/02/2000

ORAL JUDGEMENT

1. This is a revision under section 29(2) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 at the instance of the defendant-original tenant, who was sued by the original landlord for a decree of eviction under the provisions of the Bombay Rent Act. The trial court decreed the suit on the ground of non-payment of arrears of rent of more than six months

under section 12(3)(a) of the Bombay Rent Act after appreciating the evidence on record and concluding that all the conditions for application of section 12(3)(a) were satisfied. The defendant-tenant thereupon preferred an appeal, which came to be dismissed by upholding all the findings of fact recorded by the trial court. Hence the present revision.

2. Before proceeding with the merits of the matter it would be pertinent to bear in mind the principles laid down by the Supreme Court while dealing with the revisions arising under section 29(2) of the said Act. The Supreme Court in the case of Patel Valmik Himatlal & Others Vs. Patel Mohanlal Muljibhai [1998(2) GLH 736 = AIR 1998 SC 3325], while approving and reiterating the principles laid down in its earlier decision in the case of Helper Girdharbhai Vs. Saiyad Mohmad Mirasaheb Kadri [AIR 1987 SC 1782], held that High Court cannot function as a court of appeal, cannot reappreciate the evidence on record, cannot discard concurrent findings of fact based on evidence recorded by the courts below, and cannot interfere on grounds of inadequacy or insufficiency of evidence, and cannot interfere, except in cases where conclusions drawn by the courts below are on the basis of no evidence at all, or are perverse. A different interpretation on facts is also not possible merely because another view on the same set of facts may just be possible.

3. The first contention sought to be raised by the learned counsel for the tenant is that the suit notice at Exh.29, which is a statutory notice under section 12(2) of the Bombay Rent Act, is not a notice of demand within the meaning of the said section.

3.1 It is pertinent to note that this contention appears to have been raised by the defendant-tenant in his written statement though not in this specific form. However, it appears that the same was not pressed inasmuch as no issue was raised by the trial court in this regard, consequently no evidence was led by either party on this contention and was not argued. It also appears that this ground was raised in the memo of appeal before the lower appellate court, and yet the same has not been dealt with by the lower appellate court, and the only conclusion which can be drawn thereupon is that the same was not pressed.

3.2 In the premises aforesaid, I am of the opinion that the contention specifically to the effect that the suit notice at Exh.29 is not a notice of demand although

it is a Statutory Notice within the meaning of section 12(2) of the said Act is a contention pressed for the first time in the present revision. Clearly this is not permissible and I therefore do not entertain the same.

4. The next contention sought to be raised by the learned counsel for the defendant-tenant is that the findings of fact recorded by the two courts below, to the effect that the suit notice was refused by the defendant-tenant and that therefore that amounts to good service, and therefore his failure to pay the demand of arrears of rent of more than six months within 30 days of such refusal would place the case squarely within the purview of section 12(3)(a) of the Bombay Rent Act, are not findings which can be accepted, looking to the evidence on record. This contention has been extensively dealt with by the lower appellate court and particularly in paragraphs 6 and 7 of the appellate judgement, with specific reference to the evidence led by the parties.

4.1 In this context it is found that firstly there is evidence of the landlord who has testified that he had sent the registered notice, which is the suit notice at Exh.29, and that it was returned to him by the postal authorities bearing the endorsement "Refused", this endorsement having been made by the postman. Exh.30 is the cover (with AD slip) in which the statutory notice was sent, and on examination thereof it is found that the said cover does in fact bear the endorsement "refused". Furthermore, the landlord has taken care to examine the postman on duty at the relevant point of time (Exh.50) who has clearly and in unambiguous terms deposed as to the different endorsements made on the said cover to the effect that the addressee was not found on the specified dates, justifying the endorsement "N.F.", and he then specifically refers to the endorsement of "refused" and says that the same was refused on the specified day upon which he had returned the same to the post office for returning it to the sender. It is pertinent to note that there is no effective cross-examination by the defendant to the deposition of the postman. It is pertinent to note that no question was put to the postman even suggesting that the endorsement made by the postman is false or inaccurate for any other reason. It is also pertinent to note that no allegation has been made against the postman whether by way of cross-examination or otherwise, as regards his integrity and/or honesty, and/or suggesting any other motive whatsoever. According to the learned counsel for the petitioner-tenant, the defendant in his deposition at Exh.36 has rebutted the evidence of the postman. Having examined this deposition

carefully I am of the opinion that this is a gross exaggeration. Obviously the defendant having heard the deposition of the postman or having read the transcript thereof, conveniently deposed that his duty hours are from 8 am to 1 pm and thereby only indirectly suggested that during this period he would not be at home. This is the only manner in which the defendant-tenant seeks to establish that the endorsement of refusal is false. I dare say that this indirect suggestion falls far short of the evidence required to rebut strong and positive evidence which we find on the record of the case in the form of the deposition of the postman himself. I, therefore fail to see how any contrary finding other than the concurrent findings recorded by the two courts below can possibly be arrived at. I am bound to agree with the two courts in their finding that the tenant being the addressee of the statutory notice had refused the notice as per the endorsement made by the postman and that therefore in law there was good service of such notice on the date of refusal, and that the defendant could be posted with the knowledge of the contents thereof.

5. Learned counsel for the tenant then sought to raise a contention to the effect that under the terms of the tenancy the tenant was obliged to pay municipal tax, which is an annual feature, and that therefore the actual rent for the use of the premises includes the obligation to pay municipal tax, and the rent cannot be said to be rent payable by the month, and in such a case the case would not be covered by section 12(3)(a) of the Bombay Rent Act. It is however pertinent to note that there is no contract of letting in writing between the parties, nor any oral evidence, on the basis of which it could be urged that the tenant was under any contractual obligation to pay Municipal Taxes.

5.1 To support this contention learned counsel for the defendant-tenant relies upon a decision of this court in the case of Jethalal Harjivandas Vs. Hasanand Tulsidas, reported in 1977(2) All India Rent Control Journal page 42. This decision lays down the principle that where payment of municipal taxes, which happens only at the end of every year, and where the liability to pay taxes is an obligation cast upon the tenant under the contract, and where on the facts of the case the payment of the said taxes is part of the rent which is payable monthly, and there is an arrangement inter parties to pay a particular amount per month towards the tax, amounts to merely an advance payment for the convenience of the landlord and tenant and therefore provisions of section 12(3)(a) of the Act are not attracted, since it cannot be

said that the rent is "payable by the month".

5.2 No doubt, there are a number of other decisions of this court to a similar effect. The common line of reasoning noticed through the series of decisions is that where the tenant is under an obligation to pay municipal tax or other taxes, this is an obligation which arises once a year, and where the period of tenancy is a monthly tenancy, and where the rent is payable by the month, a composite enforcement of such an obligation could only lead to the conclusion that a portion of the annual tax is included in the monthly rent, and that therefore, it could not be said that the rent is payable by the month, and therefore the application of section 12(3)(a) would be excluded.

5.3 One fact of paramount importance in this case requires to be noted. Nowhere in the pleadings, of either party, and nowhere in the evidence is there any suggestion at all, that the tenant was under an obligation to pay Municipal Taxes.

5.4 In my opinion I am not required to deal with such decisions individually for the simple reason that the Supreme Court has clearly decided this entire principle in the case of Raju Kakara Shetty Vs. Ramesh Prataprao Shirole, reported in 1991(1) SCC 560. In this decision by a three Judge Bench, many principles which were formerly vague and overlapping have been clarified. This decision clearly holds in unambiguous terms that where education cess is payable by the tenant in addition to the standard rent under the rent agreement, though education cess is payable by the landlord annually, parties by agreement can quantify the amount of cess to be paid on a month to month basis by the tenant (provided the amount does not exceed the tax liability of the landlord). If standard rent is also not in dispute and the same is payable by the month, it was found that default in payment of the rent or the permitted increases for six months or more would entitle the landlord for a decree of eviction under section 12(3)(a) of the Bombay Rent Act. This decision further lays down the principle that even where the liability to pay tax is on the landlord, where the landlord has a right to recover the amount from the tenant in addition to the standard rent, it is open to the parties to come to an agreement whereby the tax amount can be quantified on a month to month basis (provided the amount does not exceed the tax liability of the landlord). In case of such quantification, although the monthly rent payable includes the monthly component of the tax, it cannot then

be said that the rent is not payable by the month, and in which case section 12(3)(a) would apply. The right to enter into such an agreement has also been upheld by observing that the statutory right to recover the tax amount by way of reimbursement can be waived or limited by the holder of such right or the recovery can be regulated in a manner mutually arranged or agreed upon by the concerned parties so long as it is not in violation of statute. If, for convenience and to facilitate payment, the parties by mutual consent work out an arrangement for the enforcement of the owner's right to recover the tax amount and/or for discharging the tenant-occupant's obligation to reimburse the owner, there is no reason for refusing to uphold such a contract, and if thereunder the parties have agreed to the tenant-occupant discharging his liability by a fixed monthly payment not exceeding the tax liability, the said monthly payment would constitute "rent" payable by the month within the meaning of section 12(3)(a) of the Act. This decision further goes on to observe that it is not correct to say that even in cases where the entire tax liability is on the landlord and the tenant had to pay a gross rent, the mere recital in the lease that the rent is inclusive of taxes takes the case outside the purview of Section 12(3)(a) of the Act. This last observation completely covers the facts of this case.

5.5 In my opinion the aforesaid decision of the Supreme Court clearly puts at rest the earlier views of various decisions of this court, whether specifically considered by the Supreme Court or not. On the facts of the case it is found that the suit notice at Exh.29 specifically asserts, in no ambiguous terms, that the standard rent on a monthly basis is Rs.10/- inclusive of municipal taxes. This statutory notice must be seen in the context of the fact that there is no written agreement between the parties. However, a proper consideration of the assertion made in the statutory notice would certainly be relevant and in fact essential if the rival claims of the parties are to be considered. Thus, the landlord's case as specifically asserted in the statutory notice is that the standard rent being the monthly rent (inclusive of municipal tax) is Rs.10/- per month. Learned counsel for the petitioner tenant sought to distinguish this, with a view to attempt to persuade me that the Supreme Court decision in the case of Raju Kakara Shetty (supra) would not apply, by submitting that in the instant case there is no quantification of the monthly component of the municipal tax, whereas on the facts of the Supreme Court case, the parties had quantified the monthly component of municipal tax

separately, had added it on to the actual rent per month, and the aggregate thereof was identified as a monthly obligation to be borne by the tenant. To my mind, this makes no difference. The principle of the decision of the Supreme Court is not based upon whether monthly component of tax is quantified or not quantified. The basic principle is that parties can agree to quantification of such a monthly component and it is open to the parties to include the same in the monthly rent payable and if that is so, the mere fact that the rent payable on a monthly basis includes a tax component would not take the case out of operation of section 12(3)(a) of the said Act.

5.6 The next contention of learned counsel for the petitioner tenant that the suit notice cannot be construed merely as a claim for rent, but should be construed as a claim for rent and monthly tax cannot be upheld. Firstly the statutory notice while referring to the obligation of the tenant only asserts that the monthly standard rent inclusive of municipal tax is Rs.10/-. It is pertinent to note that there is no quantification of municipal tax, either as a monthly component or as an annual amount due, or in any other form whatsoever. It is also pertinent to note that the statutory notice does not claim municipal tax at all. It is also pertinent to note that the suit plaint does not claim any amount by way of municipal tax as due and payable from the tenant. It is also pertinent to note that the liability and/or obligation on the part of the tenant to pay municipal tax, in case there exists any such obligation, does not form any part of the cause of action as referred to in the suit plaint.

5.7 Thus, merely the fact, and only the fact that the suit notice refers to the monthly standard rent of Rs.10/- being inclusive of municipal taxes, does not take the case out of the purview of the Supreme Court decision in the case of Raju Kakara Shetty (supra).

6. Learned counsel for the petitioner tenant then sought to contend that section 12(3)(a) of the Bombay Rent Act would not apply also because there is a positive dispute as to the standard rent. This contention cannot be upheld for the simple reason that it has been laid down in a succession of decisions that a contention as to standard rent, so as to take the case out of the scope of section 12(3)(a), must be a contention raised within 30 days from the receipt of the suit notice, and such a contention raised for the first time in the written statement in the suit cannot amount to a dispute which

would take the case out of the operation of section 12(3)(a) of the said Act. I need to refer to only two of such decisions by the Supreme Court on the point viz. (1) AIR 1976 SC 2005 (Harbanslal Jagmohandas Vs. Prabhudas Shivlal) and (2) 1995 Supp (3) SCC 416 (Bhuraram Dattaram Vs. Jivibai D. Mulchand).

7. No other contention is raised.

8. I am, therefore, of the opinion that the concurrent findings of fact recorded by the two courts below are amply justified by the evidentiary material on record, that there is no jurisdictional error, and/or any other substantial error apparent on the face of the record which would justify interference by this court in a revision under section 29(2) of the Bombay Rent Act. I, therefore, find that there is no substance in the present revision and the same, therefore, deserves to be dismissed. Accordingly the present revision is dismissed. Rule is discharged with costs. Interim relief stands vacated.

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